ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	CC Docket No. 96-115

To: The Commission

COMMENTS OF ARCH COMMUNICATIONS GROUP, INC.

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SUMMARY

Arch provides wireless messaging services, primarily paging, to over 2.7 million units throughout the United States. Arch's operations include local, regional, and nationwide common carrier and private paging systems.[1/] Consequently, Arch is a "Telecommunications Carrier" (hereinafter "Carrier") under the Telecommunications Act of 1996 (the "1996 Act"), and is subject to the provisions of Section 222 of the 1996 Act governing the use of and access to Customer Proprietary Network Information ("CPNI") by Carriers.

Arch applauds the Commission's efforts to clarify the CPNI requirements imposed by the 1996 Act in order to avoid needless confusion in the industry concerning the scope of those requirements. Arch supports federal interpretation of the CPNI requirements in the 1996 Act as opposed to the potential patchwork of state regulations to which Carriers operating throughout the country could be subject. Congress has struck a balance between privacy and competitive concerns in the 1996 Act, and inconsistent state regulations would render that balance meaningless. Moreover, variant regulatory schemes increase costs for Carriers, and ultimately for subscribers, and prevent Carriers from rolling out services efficiently.

Arch supports the Commission's tentative conclusion that Commercial Mobile Radio Services ("CMRS"), local services, and

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1/ Arch also holds interests in companies that are planning to provide narrowband PCS service throughout the country.

interexchange services should be treated as different services for purposes of implementing CPNI requirements. In addition, Arch suggests that the CMRS service category be further refined. Because of differences in bandwidth between Narrowband and Wide-band CMRS services, the services are not fully substitutable. Thus, a CPNI rule that permits the cross-marketing of all CMRS services may not strike the appropriate balance between privacy and competitive equity contemplated in the 1996 Act. Arch suggests that all Narrowband CMRS services be treated as a single service for purposes of implementing CPNI requirements, and that Wide-band CMRS services be treated as another service.

Arch believes that the installation, maintenance and repair of equipment are services necessary to the provision of the telecommunications service provided, and that Carriers should not be required to seek separate authorization for the use of CPNI to perform such services. In addition, retrieval services should be deemed "used in" the provision of CMRS service.

Arch supports the Commission's tentative conclusion that Carriers should be required to notify customers of their right to restrict access to CPNI. Arch suggests that the level of notification and procedures for securing customer consent to the use of CPNI should vary depending on the services provided and the competitive environment of the industry in which the Carrier operates. Arch requests that the FCC require local and interexchange service providers providing multiple telecommunications services to notify customers of their CPNI

rights in writing prior to requesting consent for the use of CPNI, and to secure consent to the use of CPNI in writing, until the competitive checklists provided in the 1996 Act have been satisfied. The FCC should permit CMRS providers to notify customers of CPNI rights and secure authorization for the use of CPNI either in writing or orally. A customer's consent should remain effective until such time as the customer has expressed an intent to revoke the consent. Carriers should be required to wait for a period of one year before requesting such consent again.

Arch suggests that the safeguards against unauthorized disclosure of CPNI imposed by Computer III should continue to apply during the pendency of this proceeding to GTE, AT&T, the BOCs, and to any other Carrier providing multiple telecommunications services. The Commission should utilize the Computer III requirements as guidelines in adopting rules pursuant to Section 222 of the 1996 Act in this proceeding.

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Telecommunications Carriers'	)	
Use of Customer Proprietary	)	
Network Information and	)	
Other Customer Information	)	

To: The Commission

COMMENTS OF ARCH COMMUNICATIONS GROUP, INC.

Arch Communications Group, Inc. ("Arch"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules[2/] hereby files its Comments in the captioned proceeding. The following is respectfully shown:

I. ARCH IS AN INTERESTED PARTY

1. Arch provides wireless messaging services, primarily paging, to over 2.7 million units throughout the United States. Arch's operations include local, regional, and nationwide common carrier and private paging systems.[3/] Consequently, Arch is a "Telecommunications Carrier," (hereinafter "Carrier") as that term is defined by the Telecommunications Act of 1996 (the "1996 Act"), and is subject to the provisions of Section 222 of the

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2/ 47 C.F.R. §§1.415, 1.419.

3/ Arch also holds interests in companies that are planning to provide narrowband PCS service throughout the country.

1996 Act governing the use of and access to Customer Proprietary Network Information ("CPNI") by Carriers. Arch agrees with the tentative conclusion of the Commission[4/] that clarification of the CPNI requirements imposed by the 1996 Act is appropriate notwithstanding the fact that the new requirements became immediately effective. There is, indeed, considerable confusion in the industry concerning the proper scope of the CPNI provisions. Needless controversy will be avoided with clarification at this time.

II. THE FCC HAS SOLE JURISDICTION OVER CPNI

2. A recurring concern of Arch in the implementation of the 1996 Act generally is the risk that the company, whose operations are national in scope, will find itself being subjected to a patchwork of inconsistent regulations from one state to another. Paging is a low margin business that requires an efficient and often centralized approach to subscriber service. Subscriber contracts, and marketing programs often originate in companies' headquarters for use throughout the many states and regions in which companies operate. Variant CPNI requirements from one jurisdiction to another could greatly interfere with the ability of companies to roll out services in a cost-effective manner.

3. The authority to interpret Section 222 of the 1996 Act resides with the Commission, and additional, inconsistent, state obligations with respect to CPNI protection and use must be

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4/ NPRM, paras. 2, 15.

preempted. The Commission historically has regulated the use of and access to CPNI by certain Carriers, and has preempted inconsistent state regulations concerning CPNI, based upon the authority granted in Section 2(b) of the Communications Act coupled with the precedent set by Louisiana Public Service Commission v. FCC.[5/] For the same reason that state regulations which are inconsistent with federal requirements have been preempted in the past, they must continue to be preempted.

4. The Commission noted in its NPRM that "the 1996 Act establishes a specific statutory scheme governing access to and protection of CPNI in a way that 'balance[s] both competitive and consumer privacy interests with respect to CPNI.'"[6/] As the Commission previously has found, any inconsistent state requirement relating to the use of CPNI would affect the balance struck by Congress.

5. For example, Section 222 permits the use of CPNI in the provision of "the telecommunications service" without prior customer authorization. The FCC has sought comment on what services constitute the same telecommunications service.[7/] If the FCC determines that certain CMRS services should be treated as the same Telecommunications Service based upon the competitive

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5/ 476 U.S. 355 (1986).

6/ NPRM, para. 16, citing Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 205 (1996) ("Joint Explanatory Statement").

7/ See Section III. A., infra.

environment of the CMRS marketplace,[8/] inconsistent treatment of CMRS services by a state would negate the FCC's attempt to balance competitive advantage and privacy concerns. Moreover, since the intrastate and interstate portions of a CMRS provider's service are not readily distinguishable, differing treatment of CMRS services among states would require CMRS providers to adhere to the most stringent interpretation of Section 222. For example, if a Carrier provides nationwide paging service and regional narrowband PCS service, and these services are treated as a single Telecommunications Service by the FCC, but not by all states, the CMRS provider still could not use CPNI to market both services without the customer's prior consent because the Carrier's operations may span states in which the two services are treated as separate services.

6. State regulations regarding notification of CPNI rights and authorization of use of CPNI which are inconsistent with those adopted by the FCC also could thwart the purposes behind the federal regulation. As Arch suggests below, certain Carriers possessing market power within their industry segment should be required to provide written notice to subscribers of their right to restrict access to and use of CPNI, and to secure authority to use CPNI in writing from subscribers. On the other hand, CMRS providers, who operate in a competitive marketplace, should be permitted to notify subscribers of their rights and obtain authorization for the use of their CPNI orally. Any state

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[8/] See, Section III. A., infra.

requirement which is inconsistent with the federal policy adopted would disrupt the balance the FCC strikes after considering the competitive environment in which the Carriers operate.

III. PROVISIONS FOR ALL TELECOMMUNICATIONS CARRIERS

A. Narrowband CMRS Services Should be Treated As a Single Telecommunications Service

7. Section 222 permits a Carrier to use or disclose CPNI "in its provision of (A) **the** telecommunications service from which such information is derived."[9/] The Commission seeks comment on the definition of telecommunications services and which services should be treated as the same telecommunications service.[10/] The Commission proposes to distinguish among telecommunications services based upon the following classifications: local, interexchange, and CMRS,[11/] and indicated that the decision of whether to further subdivide CMRS services will be addressed in a future proceeding.[12/] As the classification of CMRS services is central to the issues discussed in other portions of these Comments, Arch will comment briefly on the matter at this time. Arch also intends to participate in the future proceeding referenced by the Commission and urges the Commission to commence such proceeding as soon as possible.

9/ 47 U.S.C. §222(c)(1) (emphasis added).

10/ NPRM, para. 22.

11/ NPRM, para. 22.

12/ Id.

8. Arch supports the Commission's tentative conclusion that telecommunications services should be classified and distinguished as described above, i.e., local, interexchange, and CMRS. While there is some overlap in these categories,[13] they provide nonetheless a workable demarcation that will result in reasonable clarity in the carriers' obligations.

9. However, further refinement of the CMRS category is necessary. At present, two broad categories of CMRS are recognized: wide-band[14] and narrowband.[15] Because of the differences in available bandwidth in these distinct categories of CMRS, the services are not fully substitutable. This being the case, a CPNI rule that allows the cross-marketing of all CMRS services may not accord the level of privacy and competitive equity contemplated by the framers of the 1996 Act.

10. Arch suggests that, ultimately, Narrowband CMRS ("NCMRS") services, such as paging and narrowband PCS services, be treated as a single Telecommunications Service for purposes of Section 222, and that Broadband CMRS services ("BCMRS") such as cellular, specialized mobile radio and broadband PCS services, be treated as another single Telecommunications Service. Indeed,

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[13] For example, PCS carriers may use their wireless CMRS systems to offer both local- and interchange-type services. The Commission should make clear that all CMRS will be considered a single telecommunications service for CPNI purposes regardless of particular subscriber service being offered.

[14] This includes cellular, SMR and broadband PCS services.

[15] This includes paging and narrowband PCS services.

notwithstanding the further proceedings contemplated in the NPRM, Arch believes that the Commission would be well within the bounds of permissible rulemaking to adopt the narrowband/broadband distinction at this time since it provides a reasonable demarcation of telecommunications services based upon prior regulatory classifications.

B. Services Necessary To, Or Used In The Provision Of, Telecommunications Services

11. Section 222 also permits telecommunications carriers to use or disclose CPNI in their provision of services necessary to, **or used in**, the provision of the Telecommunications Service. The Commission requests comments as to what services fall within this category,[16/] and whether installation, maintenance, and repair may be provided for by this exception.

12. Arch believes that the installation, maintenance, and repair of equipment are services necessary to the provision of the Telecommunications Service and that, once a Carrier receives a subscription for service, the Carrier must be permitted to use CPNI in the installation, maintenance and repair of the equipment without seeking separate authorization from the subscriber. For practical purposes, authorization for the use of CPNI to perform these services must be deemed to be subsumed in the subscription to the service.

13. With specific regard to CMRS, Arch also believes that voice storage and retrieval services also should be deemed

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16/ NPRM, para. 26.

"used in" the provision of CMRS services. Such services are routinely coupled with CMRS, and carriers should not be inhibited from discussing these incidental services with their customers by giving the CPNI restrictions an overly expansive reading.

C. Notification of CPNI Rights and Customer Authorization for the Use of CPNI

a. Notification and Authorization Procedures:

14. Arch supports the Commission's conclusion that Carriers should be required to notify customers of their right to restrict access to and use of CPNI.[17/] The level of notification obligations should be based upon the type and number of Telecommunications Services provided and with the level of competition within the industry in which the Carrier is providing service.

15. Arch suggests that the Commission require local and interexchange service providers providing multiple Telecommunications Services to notify subscribers of their rights in writing, prior to the time at which the Carrier requests the customer's consent for the use or disclosure of CPNI, until the Carrier has satisfied the conditions in the competitive checklist provided in the 1996 Act. Further, Arch suggests that subscriber authorization to the use and disclosure of CPNI must be secured in writing until the competitive checklist conditions are satisfied.

17/ NPRM, para. 28.

16. With respect to CMRS providers, where the Commission already has found the industry to be competitive,[18] Carriers should have the option to notify customers of their rights either in writing, prior to requesting consent to the use or disclosure of CPNI, or orally, at the time of such request. CMRS providers also should have the option of securing consent to the use and disclosure of CPNI in writing or orally.[19]

17. The distinction in notification and authorization obligations imposed upon certain Carriers based upon the type of service and number of different services provided is critical in light of the passage of Section 601 of the 1996 Act, which permits the joint marketing and sale of CMRS services and telephone exchange service, exchange access, and inter-LATA service. Based upon Section 601, industry analysts have predicted that large well-heeled companies will offer packages of telecommunications services spanning several industry segments to provide one-stop shopping to consumers. While the availability of such packages may be consistent with the public interest, large well-established companies must not be permitted to gain an

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[18] See Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Radio Services, 10 FCC Rcd. 8844 (1995).

[19] Arch agrees with the Commission's observation that written authorization is preferable, since it provides a record of the subscriber's consent. NPRM, para. 29. However, since the Commission proposes to place the burden of proof relating to the proper acquisition of subscriber consent on the Carrier, the option between obtaining written versus oral consent must reside with the Carrier.

unfair advantage in their ability to market the services packages using CPNI obtained in connection with the provision of a single service.

18. In light of the proliferation of large, multi-service companies, the imposition of different obligations is reasonable. In fact, the Commission itself has drawn distinctions in the past between carrier obligations with respect to CPNI depending upon their market power.[20/] The historical purpose of restrictions on the use of CPNI was to prevent an entity with market power in one industry from exploiting that market power in order to obtain a strong position in an another industry.

19. Arch respectfully suggests that this proposal strikes a fair balance between privacy and unfair competitive advantage concerns. First, subscribers' privacy right is not placed at risk by receiving oral, as opposed to written, notification of their right to restrict use of or access to CPNI.[21/] Second, additional safeguards are necessary to prevent local and interexchange service providers from securing a stronghold in a new market segment by virtue of their significant market penetration in a different market segment. Only when

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20/ See discussion at NPRM, Section II.A.

21/ This presumes that each type of notification contains information sufficient to apprise subscribers of their rights.

these companies can demonstrate that competition exists within their marketplace may such safeguards be relaxed.

20. Arch's proposal is consistent with the 1996 Act. A central theme of the 1996 Act is the enhancement of competition in the local and interexchange marketplaces. Congress has provided guideposts, the competitive checklists, by which the Commission can judge whether competition is present within those industries. Arch's proposal uses these guideposts of competition to assist the Commission in determining when CPNI restrictions may be relaxed with respect to a particular Carrier without the danger of creating an unfair competitive advantage by the use of CPNI available to the Carrier through its provision of service in a previously non-competitive market.

b. Term of Authorization and Repeated Requests:

21. The Commission requests comment as to how long a subscriber's consent, once obtained, remains valid and how often Carriers may seek a subscriber's consent.[22/] Arch suggests that a subscriber's consent should remain valid until such consent is rescinded. Arch proposes that, once a subscriber indicates an unwillingness to continue to receive solicitations for services, the Carrier would have an obligation to remind the subscriber of its right to restrict the use of CPNI, and inquire whether the subscriber wishes to continue to authorize the use of its CPNI. If the subscriber answers in the affirmative, the Carrier may continue to use the customer's CPNI. If the response is

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22/ NPRM, para. 33.

negative, the Carrier may not request the subscriber's consent for a period of one year. This one year period also should apply to Carriers' request for authorization from a subscriber who has not previously granted such consent.

22. This proposal strikes a fair balance between Carriers' efforts to effectively utilize CPNI to market services of interest to subscribers and subscribers' interest in privacy. Once a subscriber has been apprised of its rights to restrict use of CPNI and has authorized such use, a Carrier must be permitted to rely upon that authorization until the subscriber expresses dissatisfaction with the continued use. At this point, the proposal requires a Carrier to remind the subscriber of its rights so that it may exercise, or decline to exercise, those rights. Finally, in instances where the subscriber denies authorization for the use of its CPNI, it is not an unreasonable burden on the subscriber to respond to the Carrier's request for authorization after one year has elapsed.

D. Safeguards Against Disclosure of CPNI to Third Parties

23. The Commission tentatively concluded that Carriers must establish effective safeguards to protect against unauthorized disclosure of CPNI, and requests comment with respect to what safeguards Carriers should be required to implement.[23/] Arch suggests that the safeguards required by Computer III should continue to apply to AT&T, GTE and the BOCs

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[23/] NPRM, paras. 34-5.

providing multiple Telecommunications Services based upon the competitive considerations outlined above.

24. Arch supports in part the Commission's tentative conclusion that such requirements should not be extended to all Carriers.[24/] Arch suggests that one of the purposes of the safeguards required by Computer III may be served by extending those obligations to companies providing multiple Telecommunications Services. Obligations to safeguard against disclosure of CPNI were imposed on AT&T, GTE and the BOCs in recognition of the fact that those companies provide several services and products to the public and that the disclosure of CPNI to a separate operating unit or affiliated company in another industry segment could create an unfair competitive advantage for those operating units or affiliates within their industry segment. In light of the recent mergers, acquisitions and joint marketing efforts of conglomerate communications companies, the extension of safeguarding obligations to those companies is warranted. On the other hand, companies which provide solely one type of Telecommunications Service do not have the potential to use CPNI within operating units in order to create advantages in other market segments. Arch suggests that Carriers be permitted to select the means they deem appropriate to prevent against unauthorized disclosure of CPNI.

24/ NPRM, para. 36. Arch agrees that Carriers may wish to implement the Computer III safeguards voluntarily, but that such measures should not now be required.

IV. APPLICABILITY OF COMPUTER III CPNI REQUIREMENTS

25. Arch agrees with the Commission's tentative conclusion that the 1996 Act does not preclude the continued enforcement of Computer III requirements pending the outcome of the instant proceeding.[25/] Arch suggests that the Computer III obligations be incorporated into, and used as a guidepost for the Commission's determination of, requirements to be imposed on local and interexchange companies and companies providing multiple Telecommunications Services to the public.

26. Arch supports the Commission's decline to extend those obligations to all other Carriers,[26/] where such other Carriers provide a single type of Telecommunications Service to the public. As set forth in paragraph 24, infra., Carriers that provide service within a single industry segment do not have the opportunity to establish a foothold in a separate industry segment. Thus, the applicability of Computer III to those entities is moot.

25/ NPRM, para. 38.

26/ NPRM, para. 40.

V. CONCLUSION

The foregoing premises having been duly considered, Arch respectfully requests that the Commission adopt the recommendations set forth above.

Respectfully submitted,

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